

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PENDLETON DIVISION

CONNIE SMITH,  
Plaintiff,  
vs.  
PATHOLOGY ASSOCIATES  
LABORATORIES, LLC,  
a foreign corporation  
Defendant.

No. 10-CV-126-HU

**FINDINGS AND RECOMMENDATIONS  
ON DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

Attorney for Plaintiff:  
Aaron W. Baker  
650 Pioneer Tower  
888 SW Fifth Avenue  
Portland, OR 97204

Attorneys for Defendant:  
Howard Rubin  
Jennifer a. Nelson  
Littler Mendelson, P.C.  
121 SW Morrison, Suite 900  
Portland, OR 97204

1 HUBEL, United States Magistrate Judge

2 The plaintiff Connie Smith brings this diversity action  
3 against her former employer Pathology Associates Medical  
4 Laboratories, LLC ("PAML"), asserting claims for age-discriminatory  
5 hostile work environment and retaliation in violation of Oregon  
6 Revised Statutes section 659A.030. Smith claims she was subjected  
7 to age-based discrimination throughout her two-month employment  
8 with PAML which created a hostile work environment, and she  
9 suffered retaliation for reporting the discrimination. The matter  
10 is before the court on PAML's motion for summary judgment. The  
11 undersigned submits these proposed findings of fact and  
12 recommendations for disposition of the motion pursuant to 28 U.S.C.  
13 § 636(b)(1)(B).

14

15 **BACKGROUND FACTS**

16 On February 19, 2008, Smith began working for PAML as a  
17 Clinical Laboratory Assistant at the company's laboratory in  
18 Hermiston, Oregon. Another Clinical Laboratory Assistant, Jennifer  
19 McFarlane, also worked at the Hermiston laboratory. Smith's and  
20 McFarlane's direct supervisor was Eric Williams, who worked at  
21 PAML's Walla Walla, Washington, laboratory. Williams visited the  
22 Hermiston clinic at least once a month, and was responsible for  
23 overseeing both the Hermiston and Walla Walla laboratories. In the  
24 beginning, Smith thought McFarlane also had some supervisory  
25 authority over her, but she later learned from Williams that this  
26 was not the case; they were simply co-workers. Pl. Depo. at 23.

27 Although Smith and McFarlane were the only two PAML employees  
28 at the Hermiston laboratory, the laboratory is located in the

1 Yakima Valley Farm Workers Clinic, which is staffed by  
2 approximately thirty-five employees. Smith and McFarlane worked in  
3 close proximity to and interacted daily with the clinic employees.  
4 Troyer Decl. ¶ 3.

5 PAML has a policy prohibiting harassment in the workplace.  
6 Smith was aware of the policy, and understood that she should  
7 report any kind of harassing behavior promptly, and PAML would  
8 investigate and address the problem. She also understood that PAML  
9 had an open-door policy that encouraged employees to bring their  
10 complaints to management. Pl. Depo. at 10-12.

11 At the start of Smith's employment, she received some training  
12 in Hermiston by Williams. Pl. Depo. at 15-16. Smith alleges  
13 McFarlane refused to provide her with any additional training, and  
14 when she would ask McFarlane questions, McFarlane ridiculed and  
15 belittled her, suggesting Smith was unable to "get it" due to her  
16 age, telling Smith she was unable to multi-task, suggesting Smith's  
17 eyesight was not as good as it used to be due to her age, and  
18 stating "old people [were] a waste of air." Pl. Depo. at 28-29,  
19 53. Smith claims that from her first day on the job, she was  
20 subjected to daily age-based harassment by McFarlane. She  
21 estimates she was subjected to at least fifty age-related comments  
22 from McFarlane during her two-month tenure at PAML. Pl. Depo. at  
23 29. She claims she complained to Williams almost daily about the  
24 harassment. Pl. Dep. at 27. She further claims Williams told her,  
25 on her first day of work, "that they knew they were going to have  
26 an issue with [McFarlane], because . . . she was really attached  
27 to the gal that worked there before, that she was pretty  
28 territorial about her lab and that she wasn't too happy about

1 having somebody hired . . . [a]nd that she wanted somebody close to  
2 her age." Pl. Depo. at 39-40. According to Smith, McFarlane also  
3 made age-related comments about others in the workplace, including  
4 Certified Nursing Assistants at the clinic, and in particular "a  
5 courier, an older gentleman that would come in and pick up [their]  
6 samples." Pl. Depo. at 125.

7 On March 3, 2008, Smith went to Spokane, Washington, for an  
8 orientation. While she was in Spokane, Smith told PAML's Chief  
9 Compliance Officer Marguerite Busch that she was concerned about  
10 her lack of training in Hermiston. According to Smith, Busch  
11 responded, "I will take care of it." Pl. Depo. at 18. A short  
12 time later, while Smith was on a tour of the Spokane facility,  
13 Enterprise Service Manager Cathey Smalley drew her aside and asked  
14 for more details. Smith told Smalley that she "wasn't getting very  
15 much training down there, that [McFarlane] was unwilling to train  
16 [her] at all, and that [she] had talked to [Williams] about that."  
17 *Id.* Smith continued to feel she needed more training than she was  
18 getting, and Smalley indicated "she would take care of that." *Id.*  
19 In addition, Smith told Smalley that McFarlane "had made some  
20 comments about . . . [her] being too old to retain things." *Id.*  
21 Smalley set up additional training for Smith with Patient Service  
22 Center Assistant Supervisor Carol Richey and Clinical laboratory  
23 Technician Lorna Wise. Pl. Depo. at 19; Smalley Depo. at 6-7.  
24 However, according to Smith, when she returned to the Hermiston  
25 lab, McFarlane told her, "What they do up there is the way they do  
26 it. And how I do it here in my lab is how I do it. And you go by  
27 what I do in my lab." Pl. Depo. at 32. Smith stated McFarlane  
28

1 ridiculed her every time she used the training she had received  
2 from Richey. Pl. Depo. at 31, 32.

3 On March 10, 2008, not quite a month into Smith's employment,  
4 Patient Service Center Manager Matthew Swanson met with Smith and  
5 McFarlane, separately, in Hermiston. Swanson took McFarlane to  
6 lunch, and when they returned, he and Williams met with Smith.  
7 Smith did not feel Swanson took her complaints seriously because  
8 Swanson stated "the allegations . . . did not sound like  
9 [McFarlane], that he had known her and that she didn't . . . that  
10 is not the story that he had gotten from her." Pl. Depo. at 34.  
11 In addition, the meeting with Smith was held in a room in which  
12 employees of the clinic were eating lunch. After about twenty  
13 minutes, Smith told Swanson she felt uncomfortable discussing the  
14 matter with the clinic employees present, and he asked the others  
15 to leave the room. Pl. Depo. at 35-36. At some point, either that  
16 day or on a later telephone call, Swanson directed Smith to  
17 document her problems with McFarlane in a letter. Pl. Depo. at 36.  
18 Smith understood that the letter would be used to investigate her  
19 complaints further. Pl. Depo. at 43. A couple of days later,  
20 Smith responded to an inquiry from Richey that things were going a  
21 little better and she thought everything would work out. Pl. Depo.  
22 at 44.

23 Smith had a follow-up call with Swanson sometime between March  
24 10 and 23, 2008, and on March 23rd, she provided Swanson with a  
25 seven-page, typewritten letter detailing her concerns. She did not  
26 include every incident of harassment she believed had occurred  
27 since the inception of her employment, but instead tried "to just  
28 kind of pinpoint the major things that were going on[.]" Pl. Depo.

1 at 47. In her deposition, she acknowledged that the letter  
2 mentioned only one age-related comment by McFarlane, but she  
3 testified she did not include all of McFarlane's age-related  
4 comments because she had reported her concerns verbally to PAML  
5 management by phone numerous times, and she did not feel it was  
6 necessary to repeat them again in the letter. Pl. Depo. at 49-50.  
7 She also had voiced her concerns to a nursing supervisor at the  
8 clinic in which the laboratory was housed. Pl. Depo. at 54. She  
9 further testified that "things got worse with [McFarlane] after  
10 March 23, 2008, the date of the letter. Pl. Depo. at 47.

11 Smith went to Walla Walla for a week of training from March  
12 24th to March 28th. In her deposition, Smith testified she felt  
13 she received the training she needed in Walla Walla, and she was  
14 satisfied with PAML's response to her concerns about her training  
15 needs. Pl. Depo. at 50-51. On March 27, 2008, she had a  
16 conference call with Swanson and Williams to discuss the concerns  
17 raised in her letter. Smith stated she thought McFarlane "was  
18 sabotaging [her] job," and according to Smith, Swanson "said that  
19 he would not let that happen." Pl. Depo. at 58. It was her  
20 understanding from the conversation that Swanson was going to  
21 investigate her allegations, and she felt her concerns were being  
22 addressed appropriately at that point. *Id.*

23 On April 1, 2008, Swanson had a conference call with Williams  
24 and McFarlane to discuss Smith's complaints. See Swanson Decl. ¶  
25 7 & Ex. E. Swanson grouped Smith's complaints together and  
26 summarized her different areas of concern. Smith testified that  
27 Swanson's grouping of her concerns was a fair representation of the  
28 different complaints she had made in her letter. Pl. Depo. at 60.

1 During the meeting, McFarlane admitted she sometimes was quiet  
2 around Smith, “[a]fraid that the next sentence [would] set her  
3 off.” Swanson Decl. Ex. E. McFarlane indicated she had to repeat  
4 instructions to Smith frequently, and she admitted she had been  
5 frustrated with Smith, “not treating her like she is stupid but  
6 [telling] her to look up test requirements in the PAML test  
7 directory online.” *Id.* McFarlane denied “slamming” things around,  
8 like chairs, and she denied making age-related comments to Smith.  
9 *Id.* Swanson told McFarlane to focus on the patients/clients, and  
10 to bring Smith’s errors to Williams’s attention so he could follow  
11 up on them, rather than having McFarlane correct Smith herself.  
12 *Id.* In her deposition, Smith testified that she believed Swanson’s  
13 instructions to McFarlane were appropriate. Pl. Depo. at 66.  
14 Williams also conducted his own investigation of the concerns Smith  
15 had raised in her letter, and he prepared a summary of his  
16 investigation. See Swanson Decl., Ex. A.

17 Smith did not consider her March 23rd letter to be a formal  
18 complaint. She knew her concerns were being investigated, but she  
19 was unsure whether PAML’s human resources department had seen the  
20 letter. As a result, and at the urging of one of the clinic’s  
21 employees, Smith spoke on April 14, 2008, with Kimberly Troyer, the  
22 PAML Human Resources Director, about her problems with McFarlane.  
23 Smith told Troyer that McFarlane had been verbally abusive to her  
24 from her first day on the job, and had made age-related comments to  
25 her. She told Troyer that Williams had stated the problem was just  
26 a personality conflict, and had told Smith, “[M]aybe you should  
27 quit and look for another job.” Pl. Depo. at 67-70. Troyer stated  
28 she would investigate Smith’s complaints. Pl. Depo. at 71.

1       On April 17, 2008, Williams and Swanson gave Troyer the  
2 results of their investigations of Smith's complaints. Troyer  
3 Decl. ¶ 7. Troyer and Smalley met with Williams and Swanson the  
4 same day to discuss the results of the investigation. They  
5 "decided that a personality conflict existed between [Smith] and  
6 Ms. McFarlane that clearly needed to be addressed, but that there  
7 was no evidence of discrimination or harassment." *Id.* ¶ 8. Troyer  
8 prepared two identical letter agreements for Smith and McFarlane,  
9 addressing the results of the investigation. Among other things,  
10 the letter agreements directed the women to treat each other with  
11 courtesy, and to behave professionally. They were advised that any  
12 inappropriate behavior could lead to disciplinary action. Troyer,  
13 Smalley, Swanson, and Williams met separately with Smith and  
14 McFarlane on April 23, 2008, to provide them with the agreements.  
15 Both women signed the letter agreement. *Id.* & Ex. B. Smith  
16 acknowledged that these actions were an appropriate response to her  
17 complaints. Pl. Depo. at 86.

18       Smith returned to work on Thursday, April 24, 2008. She  
19 testified that McFarlane was "really angry" that day, "slamming  
20 things around [and] her body language." Pl. Depo. at 89.  
21 According to Smith, she asked McFarlane a question, McFarlane  
22 explicitly refused to help her, Smith got upset and said she "can't  
23 take this no more," and McFarlane responded, "Then you need to get  
24 the f\*\*k out because I don't want you here and nobody wants you  
25 here, so just leave." *Id.* Smith testified she told Williams and  
26 Swanson about this encounter, and Williams said he was tired of  
27 hearing about the conflict and Smith and McFarlane just needed to  
28 work things out. Pl. Depo. at 90. She also left a message for

1 Troyer. When Troyer returned her call, Smith stated that things  
2 with McFarlane had gotten worse since they received the letter  
3 agreement. Pl. Depo. at 94. Smith also told Swanson she was  
4 afraid McFarlane "might even hit [her]," noting McFarlane had said  
5 on one occasion that "she worked out and stuff and that she could  
6 knock somebody's head off, that she lifted weights." *Id.* at 77.  
7 According to Smith, McFarlane suggested that whether or not she  
8 "would knock [Smith's] head off" depended on how much Smith  
9 "provoked her." *Id.*

10 Smith continued to have problems with McFarlane throughout the  
11 day on April 24th. She stayed home on Friday, April 25th, and then  
12 resigned on Monday, April 28th, about ten days shy of her three-  
13 month employment anniversary. Pl. Depo. at 95-100; Troyer Decl.  
14 ¶ 10. Smith testified she felt Swanson and Williams were not going  
15 to support her and "there was no other way to stay" on the job. Pl.  
16 Depo. at 101. She felt McFarlane was not going to change her  
17 behavior, and "it was unbearable" to work with her. Pl. Depo. at  
18 102-03. Both Williams and Swanson suggested to Smith that her best  
19 option was to quit. *Id.* at 79; Swanson Depo. at 40.

20 In McFarlane's deposition, she admitted she can have a "hot  
21 temper, and she had smashed into the cupboards once. McFarlane  
22 Depo. at 28, 44. She testified she told Smith on one occasion that  
23 "[e]xcuses are like assholes, everybody has one." *Id.* at 22. She  
24 stated the remark was in response to Smith's "excuse of why she was  
25 doing [something] wrong." *Id.* She further testified she did not  
26 consider that to be an appropriate workplace comment, and she  
27 considers "asshole" to be a curse word. *Id.* at 22-23. She also  
28 admitted to telling Smith, on another occasion, that she felt "like

1 a f\*\*king monkey in a cage where people throw sh\*\* at the window,"  
 2 stating she only used that type of language with people she knew  
 3 "would not be offended." *Id.* at 28-29.

4

5 **SUMMARY JUDGMENT STANDARDS**

6 Summary judgment "should be rendered if the pleadings, the  
 7 discovery and disclosure materials on file, and any affidavits show  
 8 that there is no genuine issue as to any material fact and that the  
 9 movant is entitled to judgment as a matter of law." Fed. R. Civ.  
 10 P. 56(c)(2). In considering a motion for summary judgment, the  
 11 court "must not weigh the evidence or determine the truth of the  
 12 matter but only determine whether there is a genuine issue for  
 13 trial." *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th  
 14 Cir. 2002) (citing *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d  
 15 407, 410 (9th Cir. 1996)).

16 The Ninth Circuit Court of Appeals has described "the shifting  
 17 burden of proof governing motions for summary judgment" as follows:

18 The moving party initially bears the burden of  
 19 proving the absence of a genuine issue of  
 20 material fact. *Celotex Corp. v. Catrett*, 477  
 21 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d  
 22 265 (1986). Where the non-moving party bears  
 23 the burden of proof at trial, the moving party  
 24 need only prove that there is an absence of  
 25 evidence to support the non-moving party's  
 26 case. *Id.* at 325, 106 S. Ct. 2548. Where the  
 27 moving party meets that burden, the burden  
 28 then shifts to the non-moving party to  
 designate specific facts demonstrating the  
 existence of genuine issues for trial. *Id.* at  
 324, 106 S. Ct. 2548. This burden is not a  
 light one. The non-moving party must show  
 more than the mere existence of a scintilla of  
 evidence. *Anderson v. Liberty Lobby, Inc.*,  
 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed.  
 2d 202 (1986). The non-moving party must do  
 more than show there is some "metaphysical  
 doubt" as to the material facts at issue.

*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 528 (1986). In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor. *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505. In determining whether a jury could reasonably render a verdict in the non-moving party's favor, all justifiable inferences are to be drawn in its favor. *Id.* at 255, 106 S. Ct. 2505.

*In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th Cir. 2010). Notably, “[a]s a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer’s motion for summary judgment.” *Chuang v. Univ. of Calif. Davis, Bd. of Trustees*, 225 F.3d 1115, 1124 (9th Cir. 2000). The *Chuang* court explained that this minimal evidence standard is due to the nature of employment cases, where “the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by a factfinder, upon a full record.” *Id.* (quoting *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996)).

Keeping these standards in mind, the court turns to a discussion of PAML's motion for summary judgment.

## ***DISCUSSION***

**A. Age Discrimination and Hostile Work Environment Claim**

Smith brings this action under Oregon Revised Statutes section 659A.030, which prohibits an employer from discriminating against an individual in "compensation or in terms, conditions or privileges of employment" on the basis of the "individual's race, color, religion, sex, sexual orientation, national origin, marital

1 status or age." Or. Rev. Stat. § 659A.030(1)(1)(b). Smith claims  
 2 PAML violated the statute because she was subjected to daily  
 3 harassment in the form of age-based comments by her coworker  
 4 McFarlane, resulting in a hostile work environment, and PAML failed  
 5 to take appropriate action to remedy the situation.

6 To prevail on her age-based hostile work environment claim,  
 7 Smith must show that she was subjected to unwelcome verbal or  
 8 physical conduct based on her age, and "the conduct was  
 9 'sufficiently severe or pervasive to alter the conditions of  
 10 employment and create an abusive work environment.'" *Castle v.*  
 11 *Orenco Systems, Inc.*, slip op., No. 09-6142-HO, 2010 WL 5067964 at  
 12 \*3 (D. Or. Dec. 3, 2010) (quoting *Vasquez v. County of Los Angeles*,  
 13 349 F.3d 634, 642 (9th Cir. 2003)).

14 To survive summary judgment on a hostile  
 15 work environment claim, a plaintiff must show  
 16 a genuine factual dispute as to: (1) whether a  
 17 reasonable person would find the workplace so  
 18 objectively and subjectively hostile toward  
 19 [her] as to create an abusive work  
 20 environment; and (2) whether the defendant  
 21 failed to take adequate remedial and  
 22 disciplinary action. *McGinest v. GTE Serv.*  
 23 *Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004).

24 *Id.*

25 The plaintiff "must show that the work environment was *both*  
 26 subjectively and objectively hostile." *Id.* (citation omitted). As  
 27 the undersigned explained in *Mendoza v. Wasco County*, slip op. 2010  
 28 WL 4641679 (D. Or. Nov. 8, 2010):

29 To survive summary judgment on a hostile  
 30 work environment claim, plaintiff must  
 31 "establish a pattern of ongoing and persistent  
 32 harassment severe enough to alter the  
 33 conditions of employment." *Nichols v. Azteca*  
 34 *Restaurant Enters, Inc.*, 256 F.3d 864, 871  
 35 (8th Cir. 2001) (internal quotation omitted).

1           The harassment "must be both objectively and  
 2           subjectively offensive, one that a reasonable  
 3           person would find hostile or abusive, and one  
 4           that the victim in fact did perceive to be  
 5           so." *Faragher v. City of Boca Raton*, 524 U.S.  
 6           775, 787 (1998). . . .

7           When determining whether a workplace is  
 8           hostile, the court considers all of the  
 9           circumstances, including "the frequency of the  
 10           discriminatory conduct; its severity; whether  
 11           it is physically threatening or humiliating,  
 12           or a mere offensive utterance; and whether it  
 13           unreasonably interferes with an employee's  
 14           work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). "[S]imple  
 15           teasing, offhand comments, and isolated  
 16           incidents (unless extremely serious) will not  
 17           amount to discriminatory changes in the terms  
 18           and conditions of employment." *Nichols*, 256 F.3d at 872 (internal quotation omitted).  
 19           However, "no single factor is required,"  
 20           *Harris*, 510 U.S. at 23, and "[t]he required  
 21           level of severity or seriousness varies  
 22           inversely with the pervasiveness or frequency  
 23           of the conduct." *Nichols*, 256 F.3d at 872  
 24           (internal quotation omitted).

25           "A working environment is abusive if  
 26           hostile conduct pollutes the victim's  
 27           workplace, making it more difficult for her to  
 28           do her job, to take pride in her work, and to  
 29           desire to stay on in her position." *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2000) (internal quotation omitted).

30           *Mendoza*, 2010 WL 4641679 at \*10.

31           In the present case, PAML argues Smith cannot prove either  
 32           element of her hostile work environment claim. PAML contends  
 33           McFarlane's allegedly age-related comments were insufficient to  
 34           establish a hostile work environment, and Smith's other allegations  
 35           were "nothing other than [Smith] deeming Ms. McFarlane difficult to  
 36           work with." Dkt. No. 26, pp. 16-17. PAML relies on *Kelleher v. Bank of the West*, 2008 WL 3853367 (D. Or. Aug. 14, 2008), arguing  
 37           the case is on point here.

1       In *Kelleher*, the plaintiff brought claims for discrimination  
 2 and retaliation in violation of the Age Discrimination in  
 3 Employment Act, 29 U.S.C. § 621 *et seq.*; Title VII of the Civil  
 4 Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; and Oregon Revised  
 5 Statutes section 659A. The plaintiff claimed, *inter alia*, that her  
 6 coworkers had "told her that she 'smell[ed] like old pee,' dressed  
 7 'old and frumpy,' and was 'too old to wear sleeveless tops because  
 8 [you] get loose, saggy skin from age.'" *Id.*, 2008 WL 3853367 at  
 9 \*4. She also claimed her coworkers made age-related comments about  
 10 other employees at the company. The court granted the defendant's  
 11 motion for summary judgment, holding that although the plaintiff  
 12 claimed her coworkers' harassment of her was continuous, "only a  
 13 small portion of the allegedly discriminatory conduct focused on  
 14 her age," and "the comments as a whole [were] not sufficiently  
 15 severe or numerous to create an abusive environment." *Id.*, 2008 WL  
 16 3853367 at \*5. The court "conclude[d] that the ageist comments in  
 17 the record constitute[d] 'simple teasing' and not illegal  
 18 harassment." *Id.*

19       Smith counters that she "has provided ample evidence McFarlane  
 20 participated in an ongoing deluge of inappropriate verbal and non-  
 21 verbal actions toward [her] which was swept under the rug by  
 22 management by calling it a personality conflict." Dkt. No. 37,  
 23 p. 8. She argues that the determination of whether the workplace  
 24 was objectively hostile must be "determined from the perspective of  
 25 a reasonable person with the same fundamental characteristics as  
 26 Smith." *Id.* (citing *Crowe v. Wiltel Commun. Sys.*, 103 F.3d 897,  
 27 900 (9th Cir. 1996)). She further argues that to the extent any of  
 28 McFarlane's comments could be considered ambiguous, the jury should

1 make the determination as to their meaning, rather than the court,  
 2 observing that "'so long as ambiguous evidence requires inferences  
 3 to be made, it is the role of the jury to draw such inferences.'"   
 4 *Id.* (quoting *United States v. Poehlman*, 217 F.3d 692, 706 (9th Cir.  
 5 2000).

6 In both its brief in chief and its reply brief, PAML argues  
 7 that even assuming *arguendo* that McFarlane's comments did amount to  
 8 age-related harassment, Smith has failed to show PAML failed to  
 9 take appropriate action. Dkt. No. 26, pp. 19-21; Dkt. No. 41, pp.  
 10 2-4. PAML asserts it is Smith's burden to prove PAML's response  
 11 was inadequate, and she has failed to do so. Dkt. No. 41, p. 2  
 12 (citations omitted). PAML claims its "investigation of [Smith's]  
 13 complaints was immediate, extensive, and thorough," consisting of  
 14 employee interviews, reviews of documents, and internal oversight  
 15 of the investigation. PAML argues it "specifically investigated  
 16 [Smith's] allegations of age-based discrimination/harassment,  
 17 however, they were uncorroborated and unsubstantiated, and PAML is  
 18 under no legal obligation to give credence to such allegations."  
 19 *Id.*, p. 3 (citation omitted).

20 Smith argues her complaints were not taken seriously, were  
 21 "met with disdain from her immediate supervisor and [she] was  
 22 actually advised to quit." Dkt. No. 37, p. 10. She cites  
 23 *Burlington Industries, Inc. v. Ellerth*, 524. U.S. 742, 765, 118 S.  
 24 Ct. 2257, 2270, 141 L. Ed. 2d 633 (1998), and *Faragher v. City of*  
 25 *Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 2292-93, 141 L. Ed.  
 26 2d 662 (1998), in support of her argument. Neither case is  
 27 applicable to the present issue. Both *Burlington Industries* and  
 28 *Faragher* dealt with the ability of a defending employer to raise an

1 affirmative defense to the vicarious liability claim of a  
2 victimized employee for "an actionable hostile environment created  
3 by a supervisor with immediate (or successively higher) authority  
4 over the employee." *Id.*

5 On this record, Smith has presented evidence that she was  
6 subjected to age-based comments on a daily basis by McFarlane, a  
7 co-worker, and that McFarlane failed to assist in her training, and  
8 even took actions to undermine her work. McFarlane disputes these  
9 allegations, creating a typical factual conflict. There is little  
10 question that Smith subjectively perceived McFarlane's comments and  
11 conduct as hostile and abusive. The real question on this summary  
12 judgment is whether a reasonable jury could find that the  
13 environment was objectively hostile and return a verdict in Smith's  
14 favor. In addition, a reasonable jury would have to be able to  
15 conclude from the evidence that PAML's response to Smith's  
16 complaints was inadequate.

17 The undersigned finds that even if the jury found McFarlane's  
18 comments to be discriminatory and the workplace to be hostile,  
19 Smith has failed to show PAML's response to her complaints was  
20 inappropriate. Indeed, when asked repeatedly throughout her  
21 deposition whether she felt the company's actions were appropriate  
22 and she was satisfied with the response of her supervisors, Smith  
23 testified in the affirmative. Although the court is loath to grant  
24 summary judgment in an employment case, where "very little  
25 evidence" is required "to overcome an employer's motion for summary  
26 judgment," *Chuang*, 225 F.3d at 1124, here the record evidence  
27 simply does not establish Smith's hostile work environment claim.  
28 The undersigned therefore finds that PAML's motion for summary

1 judgment should be granted on Smith's hostile work environment  
 2 claim.

3 ***B. Retaliation Claim***

4 To establish a *prima facie* case of retaliation, Smith must  
 5 show that (1) she engaged in a protected activity; (2) PAML  
 6 subjected her to an adverse employment action; and (3) there was a  
 7 causal link between Smith's protected activity and PAML's adverse  
 8 employment action. *Hardage v. CBS Broadcasting, Inc.*, 427 F.3d  
 9 1177, 1187 (9th Cir. 2005) (citations omitted).

10 Smith argues she engaged in a protected activity when she  
 11 complained to PAML's management about the harassment. She claims  
 12 she was subjected to adverse employment action when PAML provided  
 13 her with the letter agreement stating further disciplinary action  
 14 might occur if the problems continued; forced her to continue  
 15 working with her harasser; made it clear they did not want to hear  
 16 more complaints; and encouraged her to quit. She asserts, "The  
 17 causal link between the protected activity and the adverse  
 18 employment action may be established by an inference drawn from  
 19 circumstantial evidence." Dkt. No. 37, p. 11 (citing *Yartzoff v.*  
 20 *Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)). She argues further  
 21 that "[a]n objectively reasonable juror could without doubt return  
 22 a verdict for [her] on the retaliation claim with the evidence at  
 23 hand viewed in a light most favorable to [her]." *Id.*, p. 12.

24 PAML argues Smith "suffered absolutely no adverse employment  
 25 action while working for PAML." Dkt. No. 26, p. 22. PAML asserts  
 26 it is particularly significant that Smith "quit without discovering  
 27 if PAML's remedial actions were going to work." *Id.* The  
 28 undersigned agrees. On this record, PAML took appropriate and

1 thorough action to address Smith's complaints. The fact that the  
2 company failed to substantiate the complaints, and then issued a  
3 written letter agreement advising both Smith and McFarlane that  
4 further inappropriate action could be met with disciplinary action,  
5 was not retaliatory. Had Smith asserted a *prima facie* retaliation  
6 claim, then the burden would shift to PAML "to articulate a  
7 legitimate, non-discriminatory reason for the adverse employment  
8 action." *Manatt v. Bank of America, NA*, 339 F.3d 792, 800 (9th  
9 Cir. 2003) (citing *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir.  
10 2000)). Here, there is no adverse employment action for which PAML  
11 must articulate such a reason. The undersigned recommends that  
12 PAML's motion for summary judgment be granted as to Smith's  
13 retaliation claim.

14

15 **CONCLUSION**

16 The undersigned respectfully recommends that PAML's motion for  
17 summary judgment be granted. These Findings and Recommendation  
18 will be referred to a district judge. Objections, if any, are due  
19 by **May 23, 2011**. If no objections are filed, then the Findings and  
20 Recommendation will go under advisement on that date. If  
21 objections are filed, then any response is due by **June 9, 2011**. By  
22 the earlier of the response due date or the date a response is  
23 filed, the Findings and Recommendation will go under advisement.

24 IT IS SO ORDERED.

25 Dated this 4th day of May, 2011.

26 /s/ Dennis J. Hubel

27  
28 

---

Dennis James Hubel  
United States Magistrate Judge